IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY THIRTY-ONE

APRIL 13, 2011

Camp Verde, Arizona

ORIGINAL

REPORTED BY
MINA G. HUNT
AZ CR NO. 50619
CA CSR NO. 8335

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Proceedings had before the Honorable WARREN R. DARROW, Judge, taken on Wednesday, April 13, 2011, at Yavapai County Superior Court, Division Pro Tem B, 2840 North Commonwealth Drive, Camp Verde, Arizona, before Mina G. Hunt, Certified Reporter within and for the State of Arizona.

P R O C E E D I N G S

THE COURT: We're on the record in State versus James Arthur Ray. He is present presented by Mr. Li, Mr. Kelly, Ms. Do. The state's present through Ms. Polk and Mr. Hughes.

This is the time set for argument on a motion for mistrial. I'll tell you at the outset I'll hear the oral argument. I've received a great deal of briefing in the last two days. I anticipate that I will consider the matter and probably have a ruling done by early afternoon. Just to give you a time frame and what I anticipate.

Ms. Polk, I was informed that you had other legal issues you wish to raise. I think it makes sense to take those up conditionally at the close of the argument on the pending motion.

Mr. Li, are you going to --

MR. LI: Yes, Your Honor. May I approach the lectern?

THE COURT: You may.

MR. LI: Your Honor, at issue here is a report or an email drafted by an environmental engineer that states two relevant factors. One, that carbon dioxide and not heat stroke is a possible cause of

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death for the three decedents; and, secondly, that various environmental conditions created by the design of the sweat lodge, for which Mr. Ray has no responsibility, could have contributed to those deaths.

When we initially filed this motion, the team got together and we thought that what we would do is submit the pleadings to the Court and simply say, Your Honor, it's a fairly clear violation of Brady and the only issue we need to talk about is what the remedies are.

Then yesterday we received the state's pleading, which I will describe as aggressively unrepentant. And --

THE COURT: Mr. Li, I just want to say right at the outset I'm going to ask -- as I did previously, I'm going to ask both parties confine this to legal argument, straight legal argument. And I'm going to insist on that.

MR. LI: I appreciate that. And I will, Your Honor.

And as a consequence, we felt it necessary to respond to each of the arguments made and lay out our legal argument. And per the Court's instruction, I apologize for overstepping

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already. But I had intended to say to the Court that I will constrain myself in solely the legal argument. That will be my effort here, Your Honor.

Let's talk about what's not in dispute. What's not in dispute is that there are three factors that the Court must find to find that under Brady the due process clause has been violated.

The first is that the government suppresses evidence. The second is that the evidence is favorable to the defense. And the third is that the evidence is material. And I'm going to address each of those elements. And I think in addressing them I'll also address a number of the arguments made by the state.

Let's talk about what's not in dispute. What's not in dispute is, one, in April 2010 the government corresponded with an expert that had been provided by the plaintiff's lawyers in this case -- who is an environmental expert.

Two, that these communications include an April 29, 2010, email, which is attached to our motion as Exhibit A.

Three, that the communications also appear to have included a subsequent brief, quote, unquote, interview of Rick Haddow conducted by the

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state. And as a result of this interview, the state, quote, unquote, determined he could be an appropriate witness as to the air quality and environment within the sweat lodge. That's at the state's motion, page 4.

Four, the expert appears to have a background in environmental engineering, which appears to include regulatory work related to toxins and hazardous material and air quality.

Your Honor has I think at -- in the state's 15th disclosure Mr. Haddow's CV, which I will provide also to the Court for the Court's convenience. But it's quite extensive.

And if I may approach with the CV.

It's quite extensive. I won't go into all of the details. But Mr. Haddow sets forth, fairly significant qualifications. We've not had an opportunity to test any of them. We don't know what his real background is or any of that.

But just based on the CV, he does appear to be what he claims to be, which is an environmental engineer who deals with air quality issues. He appears to have government positions previously in Maricopa County, and he seems like a serious guy. I don't know who he is. We've never

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interviewed him. We haven't had the chance to test any of that.

What's also not in dispute is that on October 27, 2010 -- this is after the April 29, 2010, email and after the brief interview of Rick Haddow and after he provided his CV to the state and then the state provided it to all of us -- the state listed Mr. Haddow as an expert who had examined evidence in this case. And that's the state's 15th disclosure.

This disclosure also states that, quote, unquote, no report was prepared in this case. The record is also clear and not disputed that the defense made four separate requests, specific and explicit requests, in writing for all statements by Mr. Haddow. These requests were on November 18, 2010, December 7, 2010; February 4, 2011, and March 31, 2011. They are attached to our motion as exhibits C, D, F and G. And I can give the page cites as well.

They are explicit. They ask for information about this particular expert. It's also undisputed that the state replied to not one of these requests, not one, with a possible exception of the very last one, in which they

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handed over this report.

It's also undisputed, Your Honor, on December 1, 2010, this court ordered, quote, the state's obligations under Rule 15(1)(b)(4) apply to all experts regardless of whether or not the state intends to call the expert at trial and arises once this expert has considered any evidence in the particular case.

The state is -- it's also undisputed that the state did not produce Mr. Haddow's, quote, unquote, summary of environmental conditions until last week, eight weeks into trial.

So let me address first the -- all those facts are undisputed, Your Honor. Let me just address the first prong of the Brady violation, which is that the government suppressed evidence.

There is no dispute that the state failed to disclose this evidence that is subject to the motion despite four separate requests by the defense and despite the Court's order of December 1.

As the United States Supreme Court has stated in U.S. v. Agurs, quote, when a prosecutor receives a specific and relevant request, the failure to make any response is seldom if ever

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excusable.

The state never responded to Ms. Do's repeated and explicit requests. Again, it's Exhibit C at page 4, Exhibit D at page 1, Exhibit F at page 6, Exhibit G at page 2.

With respect to Exhibit C, Your Honor, when we were copying the exhibits, there was an error, and several of the pages were omitted. And as a consequence we filed a supplement which includes the entire letter. The supplement is called "Addendum to Motion."

And if Your Honor would like, I can approach with a copy of it.

THE COURT: It was filed on the 12th. I have that.

MR. LI: Thank you. At page 4, I just point this one out for example, it says, additionally, Mr. Ray requests any and all statements made by Steven Pace and Richard Haddow, and cites the various rules.

This is all in addition to the standard Brady requests that defense always makes in every case. These are specific requests for notes and statements by Mr. Haddow. And they are all as explicit as the statement in this first letter of

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November 18, 2010.

Now, the reasons for these rules, Your Honor, is clear. The prosecution has a duty not just to win a case but to ensure that justice is done. For this reason Arizona law sweeps even more broadly than the supreme court. Arizona Supreme Court has stated, simply stated, the rule is that the prosecution must turn over to the defendant full information regarding any exculpatory evidence it possesses. This is State v. Jones.

And as a caveat to prosecutors, if you are in doubt as to whether or not a defendant knows of certain exculpatory evidence already known to the state, reveal it.

There is no dispute that the state knew about Mr. Haddow's statement as of about April 29, 2010. There is no dispute that the state then interviewed him in determining whether or not he should be an expert. There is no dispute that based on those interviews they decided that he would be an expert.

There is no dispute that the state then listed him as an expert on October 27. There is no dispute that the defense made four separate, explicit requests for discovery on Mr. Haddow.

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There is no dispute that the state ignored these requests until perhaps the very last one.

There is no dispute that after the second request for discovery by Ms. Do on December 1, something like that -- I'm sorry. Strike that. December 7, the second request on December 10, three days later, the state withdrew Mr. Haddow as a witness.

There is no dispute that on December 1, 2010, the Court made its ruling regarding communications with experts. And there is no dispute that the state failed to disclose the Haddow communications until last week.

Now, the state says this was inadvertent. First, as a matter of law, that's irrelevant. It also calls into question what even "inadvertent" means. Because in this particular case, the evidence is somewhat different than inadvertence. Because the facts are that despite repeated requests from the defense for this specific item, the state chose not to respond and not to produce information.

And I'd ask the Court to look at Bagley, the United States Supreme Court case, 473 -- I don't have the general page cite. But the PIN cite

is 682 and -83. This is the supreme court speaking: An incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist.

Now, third, the state also affirmatively presented to this court and to the defense that no report had been created by this expert, notwithstanding the fact that they have had in their position an email that they will state is not a report, but just an email, but an email that identifies a different cause of death and a different mechanism, the construction of the lodge.

This is exactly the type of concern that the Bagley court -- the United States Supreme Court in Bagley was concerned about. This is exactly the problem that the United States Supreme Court was concerned about.

Quote, the prosecutor's failure to respond fully to a Brady request may impair the adversarial process. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist and

to make pretrial and trial decisions on the basis of this assumption.

It is simply not enough, Your Honor, to claim in this context that this was inadvertent, that it was a mistake. It might have been an error in judgement. But it is clear that the state knew of these various statements by Mr. Haddow.

It is clear they made strategic decisions based on those statements. It's clear that they made further strategic decisions about whether Mr. Haddow could be a witness based on an interview, the details of which we still don't have. They made a decision to list him as an expert.

And it is also clear that we made numerous requests. And after the second request they withdrew Mr. Haddow as a witness.

The Court doesn't need to find at this stage -- does not need to resolve whether this is an intentional or unintentional gap on the part of the state. What is relevant for the question of the Brady violation -- and the remedies we can discuss later. But what is critical for this court to determine as to whether or not there is a Brady violation is just simply did the state know about

it and did they not produce. The answers are affirmative. They knew. They did not disclose it.

The second factor, Your Honor, relates to whether or not this information is favorable to the defense. And I would submit, Your Honor, that on its face it is. But I will -- because of the state's position that it's, in fact, inculpatory and not exculpatory, we feel compelled to make at least some proffer and set the record why this is favorable to the defense.

I think as the Court and everybody in this courtroom is aware, we've had at least three themes in this case. The first is relating to the state's -- I'll eschew rhetoric -- but the nature of the state's investigation, the fact that they were focused on Mr. Ray from the start and that they overlooked other leads, purposefully.

I think the second basic theme of this case is that Mr. Ray didn't cause the deaths. There was a superseding, intervening cause and that the state cannot prove beyond a reasonable doubt and cannot meet its burden that Mr. Ray caused these deaths.

And the third fairly fundamental theme that has been throughout this case is that the

state can't meet its burden that Mr. Ray knew people were dying. And the Haddow report or summary of environmental conditions, whatever we want to call it, is relevant to all three themes.

With respect to the investigation, it is now clear that as of April 29, 2010, the state was aware of the following facts, or at least the following opinion offered by an expert, whose CV I've handed the Court -- who, for all we know, is a valid -- you know -- environmental engineer.

So what the state knew on April 29, 2010, is that an environmental engineer hired by the plaintiffs -- and I want to note one thing for a second, Your Honor. It is also a Brady violation that they did not indicate in their disclosure that their source of this particular witness was a plaintiff's lawyer who is suing Angel Valley and at the time Mr. Ray. So that also has relevance to that particular witness's bias and what have you.

But we'll put that aside for a second and focus on what conclusions this particular expert came up with.

First, that all three decedents, not just Ms. Neuman, as stated in the government's papers -- if you look at bullet point 4, you will see that

this expert opines as to all of the decedents. All of the decedents could have died from CO2 poisoning. That is a different cause of death than the heat stroke being alleged by the state.

The second major point -- and there is a number of them in the bullet point. And the Court has it as Exhibit A. The second point is because of the design of the sweat lodge, a certain section of the lodge, quote, unquote, experienced hazardous concentrations of CO2 and experienced a radiant-heat barrier that would greatly contribute to the section's air stagnation and build up of CO2.

And I would add to that, Your Honor, any other toxins that might have been present would not -- would also not be ventilating as a result of this radiant-heat barrier that this environmental engineer looking at the structure believed was there.

This would also severely limit ventilation and air exchange. So this is another fact that the state knew at least as of April 29, 2010.

Further, Mr. Haddow opines that the lodge's construction created a near airtight

structure. That's another point that the state was aware of on October -- April 29, 2010.

And that the rock pit radiant heat would create positive pressure inside the lodge that would lessen the lodge's ability to exchange inside air to outside, ambient air.

The point I'm making, Your Honor, is that as of April 29, 2010, the state was aware of an expert witness, who they eventually listed as a witness, who would say that the design and materials used by the sweat lodge, one, may have caused the decedents to die of carbon dioxide poisoning.

What that means, Your Honor, is as of April 29, 2010, the state was aware of yet another expert who thought there was some other cause of death, and not only that, who thought that something for which Mr. Ray has never had any responsibility for, which is the design, construction, materials used, et cetera.

If we've proved anything, we've proved that fairly well. And Mr. Ray has had nothing to do with any of that.

So at least as of April 29, 2010, the state was on notice that they had an expert who

said, who suggested, a different cause of death and, frankly, a different culpable party.

Now, I'm not saying that the Hamiltons are criminally culpable for this. Okay? But I am saying that at least as of that date, the state was on notice that the Hamiltons perhaps were a superseding, intervening cause of what happened at the sweat lodge ceremony.

But the state did nothing with this information. They didn't share it with the medical examiners who testified, or one of whom testified. They didn't share it with the treating doctors. They didn't share it with their new medical expert, Dr. Dickson. They didn't follow up with the Hamiltons about this particular design. They didn't follow up with the Mercers specifically about this particular design.

And, of course, Your Honor, one critical fact that needs to be acknowledged in this particular case is that on October 10, less than 48 hours after the accident, after three -- after two people died and one would soon die, the sweat lodge was destroyed by the Hamiltons.

So the ability to test any of Mr. Haddow's theories about whether a radiant-heat

barrier was created by the particular pit or whether the particular construction, the way -- the materials used, et cetera, and the way it was designed, whether that actually could have contributed to the deaths of the three decedents -- that's all gone forever.

So the bottom line on this one point, this one theme, is that it supports the fact that the state knew this information and disregarded it and didn't use it and, frankly, sat on it until a week ago lends credence to the defense theory that has been articulated throughout this case that the state always looked at Mr. Ray from day one. The way I put it in opening, Your Honor, the state looked in one direction and one direction only.

As a sidenote, the fact that Mr. Haddow also believes that heat killed the decedents does not alter his conclusions. He says everything in there. And there is case law about cherry picking facts in determining whether or not a particular report is exculpatory or inculpatory. And I'll get to that in a second.

The fact is that we gave the report to the Court in good, bad and ugly. But the bottom line is there are those elements that I described.

The second element of our defense has been, of course, causation, that the state has failed to prove beyond a reasonable doubt that Mr. Ray caused the three folks to die.

And Ms. Do has elicited testimony from various medical examiners suggesting that issue, and we have been pushing on that point.

Now, it is also relevant to that same cross-examination that would have been done with every expert that has -- every medical doctor who has showed up here and, frankly, almost every other witness who has shown up here. There would have been cross-examination about this particular issue, whether or not the radiant-heat barrier created certain environmental conditions.

And remember that the state must prove beyond a reasonable doubt that it was not a superseding, intervening cause that caused these folks to die. And that's something that we argued about last week, Your Honor, with the state, about whether or not at this stage in the trial, after all this evidence about causation, whether or not we should have that instruction read or some form of that instruction read.

Well, the fact that it wasn't read -- it

may be read. We can -- that's passed. But what isn't passed is that causation. The state's burden on causation has been something we've been pushing on from day one and that this report is directly relevant to.

The third theme of the defense that the Court has heard repeatedly is the theme about knowledge. And this relates to the fact that Mr. Ray sitting on one side of the lodge doesn't know what's happening on the other side of the lodge, and, in fact, does not know better than those people who are sitting right next to the people at the other side of the lodge. The Court has heard evidence about conversations which took place between people on the other side of the lodge.

Now, we have argued that Mr. Ray did not know that people were dying. Now, it is entirely relevant to that discussion that, according to Mr. Haddow, there is environmental conditions that create different conditions where Mr. Ray is seated as opposed to those conditions on the other side. Not just heat, but also the ability to circulate air and the buildup of toxins and what have you.

And Mr. Ray is not aware of any of those

because he didn't design this. And there is no evidence that the government can produce or will produce that Mr. Ray somehow knew that this concealed defect was creating these hazards on the other side of the sweat lodge.

And so it is not true, as the state alleges in its brief, that this report is, quote, unquote, inculpatory as opposed to exculpatory. These are direct -- this report is directly relevant to the themes that we've raised throughout this case.

And the idea that the state can cherry pick parts of Mr. Haddow's report has been addressed specifically by the ninth circuit in a case called "Bailey v. Rae." I may have a copy that I can bring up. It is 339, F.3d, 1107. It's a ninth circuit case, 2003.

And if I may approach Your Honor with a copy of the case?

THE COURT: You may.

MR. LI: This exact issue about cherry picking facts out of a report to claim it's inculpatory as opposed to exculpatory, Bailey v. Rae 1115, in which the Court addressed exactly this issue.

The Court said the state downplays the

exculpatory nature of the evidence by cherry picking isolated references from the report. We find this approach unavailing. To say that evidence is exculpatory does not mean that it benefits the defense in every regard or that the evidence will result in the defendant's acquittal. Rather, the preliminary inquiry in a Brady claim has always been whether or not the evidence is favorable to the accused.

The Court cites United States v. Howell, 231 F.3d, 615 at 625, another ninth circuit case, 2000. Quote, that the information withheld may seem inculpatory on its face in no way eliminates or diminishes the government's Brady duty.

So it is irrelevant for purposes of this court's analysis how the government chooses to describe this particular report. The Court must look at the report and say is this usable by the defense? I'd submit that that is absolutely -- the actual language in there fits well within the various themes that are raised by the defense.

The state also seems to believe in its pleading that because Mr. Haddow was never retained by the state and paid, that the state somehow had no Brady obligation relating to his report or

email.

First of all, as a matter of law, that's simply wrong. There is a fair amount of effort spent in the brief describing how Mr. Haddow was never actually retained and was never actually paid. That fact is simply irrelevant.

It doesn't matter whether a witness is paid or not if that witness has exculpatory information. That's not relevant.

Second, it's belied by the facts. The state actually listed this man in its 15th disclosure as an expert who had examined evidence. This court's ruling in December of 2010 also directly addresses whether or not this particular expert who examined reports, whether he's going to be called or not, that his notes need to be disclosed. And that was this court's ruling.

The Court -- the state also appears to argue that Mr. Haddow's summary of environmental conditions was preliminary, and because of the fact it was preliminary, it did not need to be disclosed. Again, that's simply wrong on the facts and wrong on the law.

Just as an initial matter, Brady is Brady whether it's preliminary or not. And, frankly,

many cases find preliminary reports to be highly exculpatory because they suggest different things than subsequent reports.

And I would cite to the Court State v. Vilardi. This is in our brief. At 76 New York, or N.Y. 2d, 67, 1990.

This is a Brady violation where the state failed to disclose an expert report indicating that the expert had been unable to find evidence of arson during his initial inspection.

Another case is Paradis v. Arave, 130 F.3d 385, ninth circuit case in 1997, also cited in our brief. The Court found a Brady violation where the prosecutor failed to disclose that the medical expert who testified at trial that the victim was killed in a certain place had initially opined that the victim was killed somewhere else or that he had not been killed in -- it was a creek.

Secondly, this is belied by the fact that repeatedly the state has disclosed reports that on their face are stated as preliminary.

And I will -- if I may approach, I'm going to hand the Court two examples. One is a report from a medical expert that the state intends to call -- Dr. Dickson. And this is January 10,

2011. It's entitled "Preliminary Report."

There is another report which was subsequently amended but was also produced to us as an expert report relating to Steven Pace, who is not going to testify, but who there was disclosure given to us. And it's a draft report. This report was subsequently amended and the "draft" removed. But the state knows that a preliminary report from an expert should be disclosed.

I would also cite these IMEs for Ms. Spencer and Mr. Mehravar. These are independent medical examinations of these two witnesses -- Mr. Mehravar. You remember Mr. Mehravar. And Ms. Spencer, who has not yet testified. These are reports that were provided to the state by the plaintiffs' lawyers involved in those cases.

Now, I think the Court will recall -- just a sidenote. I think the Court will recall that the state and I had a dispute over whether or not I could use the lawsuits in this case. And it was represented that it was unfair surprise to the state about this particular lawsuit. And specifically had to do with Mr. Mehravar. And now Mr. Mehravar's lawyer had, in fact, provided to the

state an independent medical examination of Mr. Mehravar in connection with his lawsuit well before the trial even began.

But the limited point I'm making here for purposes of this argument, Your Honor, is that report is also described as a "preliminary report."

So the idea that preliminary somehow washes the report of any -- washes the government of a ready obligation is wrong on the facts and wrong on the law.

The third element that we must prove -- and I have to tell the Court I appreciate the Court's patience with this argument. It's a very important issue for Mr. Ray. I appreciate the Court's indulgence on us setting this record. I really do.

The third element is materiality. First of all, there is a common sense issue here. And this common sense issue, as is often the case, is born out by the case law. And the common sense issue is that there is a qualitative difference, Your Honor, between the opinions and observations of an expert and the opinions and observations of lay witnesses. There is a qualitative difference.

And if the Court looks at a number of

cases -- I cite again the Vilardi case and the Paradis case. And I'll also cite Benn v. Lambert, 283 F.3d 1040, ninth circuit, 2002.

There, as I said, a qualitative difference when courts examine the failure to disclose an expert's opinion as opposed to the failure to disclose some minor piece of impeachment evidence or the failure to disclose something that is truly cumulative of the same point.

And that's because by definition, experts have knowledge that common folks don't. They can look at a structure and they can determine whether or not because of the design of the structure certain environmental conditions were present or not present. They can look at blood, for example, and determine whether -- about the DNA.

And the state spent perhaps almost all of its brief, essentially, from page 5 to 14, on the suggestion that well, there is no harm, no foul, because actually the defense knew about the design of the sweat lodge and that CO2 might have been the cause of death.

The state cites five pages of lay witnesses who said it was hot on one side and not as hot on the other. Although the Court has heard

contrary testimony from other witnesses who, in their subjective opinion, thought one side was hotter than another. And so even that's not particularly clear.

But more importantly, that's just lay opinion about how they personally, subjectively perceived the temperature, as opposed to an expert's opinion that the design created certain physical facts, air quality facts, that are relevant to this case.

A computerized diagram that just has not much more to it. The state also cites the musings of a guy named Mr. Sundling, who apparently has an interest in this case, whose qualifications are, essentially, unknown other than he maintains a blog about this case. And who has also been listed as an expert by the state.

This is just some guy, I think, in Indiana or something like that, who maintains a blog, has read all the reports in this case, and somehow that witness is the same as doctor or Mr. Haddow.

Another amazing fact is the state also cites a June 16, 2010, interview with Detective Diskin. And I believe Mr. Hughes was

present at that interview. I don't recall whether it was Mr. Hughes or Ms. Polk. I believe it was Mr. Hughes who was present at that interview.

And we asked the detective, tell us everything looked at to tell us what could have caused these deaths. And he said carbon monoxide. And then he said carbon dioxide. And I'll be frank with the Court. When we heard that, we just got it wrong and was mixing up carbon monoxide and carbon dioxide.

So we asked for clarification. Do you mean carbon dioxide or carbon monoxide? And he said, carbon dioxide. And he knew what he was talking about, because less than a month and a half earlier, he had received that email from Mr. Haddow in which Mr. Haddow says carbon dioxide is a possible cause.

I don't know whether or not the detective, Detective Diskin, had a subsequent conversation close to that interview in which further information about carbon dioxide was shared.

What the detective did not say -- what the detective knew and did not say and what the state's attorneys watched happen and remained

silent was the detective did not say, hey. I consulted with an environmental expert who says -- we don't know if we're going to use him or not. But we consulted with an environmental expert who said carbon dioxide is a possible cause of death because of the environmental conditions inside the sweat lodge.

The detective did not say that to us. He artfully phrased his question, just answered only exactly what was asked. We had no way of knowing. And the state, whichever lawyer was sitting there, just didn't say a word, didn't say a word. Notwithstanding the fact that the Brady obligation was triggered on April 29, 2010.

The state also cites the preliminary reports relating to the lawsuits of Sidney Spencer and Mehravar that I've already gone over.

The state also cites Stephen Ray's medical records in its report -- or in its brief. Stephen Ray's medical records do have some vague mention to carbon dioxide in connection with carbon monoxide and in connection with other toxicities.

And Stephen Ray is the participant whose treating doctor concluded he did not have heat stroke. We had a whole back and forth in this

courtroom about whether carbon dioxide in that report with was somehow an error and whether they meant to say carbon monoxide or whether it was a transcription error.

But all the while while we're having this conversation with Stephen Ray, the state knows and has in its possession this environmental report from Mr. Haddow saying it's it could be carbon dioxide. And there is no attempt to clear that up ever.

And, moreover, Mr. Ray's reports, Stephen Ray's medical reports, are only produced on February 4, 2011, what, 12 days before trial starts, and only because the defense requested them in January. They were requested actually for quite some time. But once again requested the full reports of Stephen Ray in January 2011, a month or so before the trial.

Now, remember, one the critical factors of this is that -- I think the record on that is fairly clear. But one of the ironies of this argument is that the state has concluded and repeatedly argued that these records that discuss toxic exposure and carbon dioxide, possible toxidromes and what have you, this -- the state has

said -- you know -- that actually is all a red herring -- you know. It's all just something that the defense has made up, as good defense attorneys do, to create just some -- you know -- flash and bang in the courtroom and to try and mislead the Court and the jury.

And what's ironic about that argument is while they're making that argument, they have in their possession something that they asked for and that they then listed a guy as an expert that says, you know what. It could be toxicity. Carbon dioxide is toxicity. And you know what. It could be the construction of the lodge.

So while we ar being called, whatever, while all those things are happening, the state knows that there is contrary evidence in its own files.

Finally, the state lists the civil lawsuits as evidence that we should have been on notice of something. That's just -- it's, again, wrong on the law, wrong on the facts. The facts are that each of the lawsuits don't talk about what's in Mr. Haddow's report. They don't talk about a radiant-heat barrier. It's not -- it's a lawsuit. It's not an expert opinion.

And, moreover, it's just not the case that these lawsuits put somebody on notice that there might be in the state's file an expert report. That's just simply -- these are -- it's talking in completely the wrong direction.

Now, what the state attempts to do with that nine pages, some-odd, of information is to claim that well, no harm. No foul. You heard from three or four lay witnesses that they thought it was really hot on one side versus another. No harm. No foul. There is no Brady violation. It's not exculpatory. Let's just keep going. Don't worry about it.

That's not what the law is, Your Honor. As an initial matter, while the cases do require the defense to do some due diligence, this typically involves things that are easily and publicly available to everybody. Okay?

It does not involve us divining that the state has in its file a report. What the state -- what the courts suggest, Your Honor, in these types of circumstances where the issue is not some random fact or something, but rather a piece of discovery that exists in the state's files, the remedies and procedures that the courts suggest is discovery,

making specific, articulate requests for specific information relating to specific people. That's what the courts say.

Hey. Look. If you don't have it, and you want it, use the discovery process to get it. And that's exactly what we did, Your, Honor, four separate times.

The Court remembers, I believe, the various discovery battles we had about experts and reports and relating to the medical examiners relating to the meeting the state had with the medical examiners in December 2009.

The Court -- we briefed that, argued it, also availed ourselves of all the other mechanisms of discovery, writing four separate letters specifically asking for statements by Mr. Haddow by name.

More fundamentally, what the state never addresses in its briefing is the basic difference between expert testimony and lay observations. The state also never addresses the difference between an expert opinion and allegations in the lawsuit. The state never addresses the difference between an environmental conditions expert who would testify about, frankly, Your Honor, cause and medical

opinions which would, essentially, talk about the effect.

And, most importantly, what the state never addresses in its brief is the impact of their statement to this Court and the defense in disclosure 15 that no report had been prepared.

And if I may just use a brief analogy. It would be as if the state had photographs of a crime scene with blood spatters all over the wall, including perhaps some of the defendants. And then the state had an expert in that -- they met somehow, who tested some of the blood, examined some of the evidence, and said you know what. That blood is not the defendant's. Exculpatory evidence that's not obviously observable by a layperson but an expert's opinion.

So they have this, but they didn't retain him. It was in the civil case relating to this. And so they had this email from the guy who says -- you know -- it's not the defendant's blood. But they never retain him. It's just an email. It's not a report.

And then the state says well -- they interview the guy. And then they decide well, let's list him as an expert. He might be useful.

He makes other conclusions about blood and what have you. He might be useful for us.

And then they write in this same case, when they disclose him there is no report drafted. And then when the defense makes specific requests relating to that specific witness, the state withdraws him as a witness and never releases the email, we'll call it, in which he says, I looked at the blood. It's the not the defendant's blood.

The Court would look at that, I believe, and find a clear, knowing, purposeful, strategic Brady violation. And it is very difficult for me to see how our current situation -- obviously I've reasoned it a little extreme. I'm using blood and DNA.

But it's very difficult for me to see how these general -- these general analogies are different.

Finally, on the point of cumulativeness, which the state says -- the state makes the representation that this expert's opinion is cumulative to those lay observations of various witnesses and others about potential CO2 poisoning, the positioning of the pit and what have you.

This also fails as a matter of law. We

have a number of cases on this. I cited already Bailey v. Rae. The Court noted, quote, the state's answer to the materiality question is that the suppression of Ford's -- this is the expert. The expert's report could not have prejudiced Bailey, the defendant, because the reports were merely, quote, cumulative of testimony given by the victim herself.

So this is the state saying lay testimony rendered the expert opinion cumulative.

Rejecting this argument, the Court commented, cumulative evidence is one thing. Unique and relevant evidence offered by a disinterested expert is quite another.

By summarily dismissing the Ford report, the expert report, as cumulative, the state court fundamentally mischaracterized their nature and significance.

And I would note, Your Honor, many of the cases that we're citing here are habeas cases, which are on a very different standard, as the Court is aware, than just direct appeal. And so it's a much higher standard.

And in this particular case, the ninth circuit said that the state court erred by

accepting the state's argument that an expert opinion was cumulative to those of lay witnesses.

I'd also cite another case, Your Honor. Boss v. Pierce, which is at 263 F.3d, 734. And if I have another copy, I'll hand it out.

And this stands for the same proposition, which is that a statement was not cumulative when it was provided by a disinterested witness. The Court also found error. And this statement was actually disclosed before trial.

And, Your Honor, if I may approach?

THE COURT: Yes.

MR. LI: Thank you.

And, Your Honor, this cumulative argument the state makes also misses a fundamental aspect of the defense that we've proffered here, which is that -- and the materiality of the fact that these reports or this report was sitting in the state's file is a central element to our defense. And this cumulative argument fails to address that.

That argument, again, is that they had evidence of other causes and they just ignored it. So simply the fact that various witnesses say it was hot on one side versus another or these lawsuits or whatever, even if the Court were to

find that somehow that puts on us on some investigatory duty, which I think would be contrary to the law -- even if the Court found that, it fails to address the central idea that the state was aware of exculpatory information suggesting another cause of death, suggesting another party perhaps responsible, suggesting a superseding, intervening cause and did nothing with it, shared it with nobody.

Your Honor -- and, again, I appreciate the Court's time on this. Obviously an extraordinary important issue for us, because we do feel we've been deeply prejudiced by this. And so I want to just talk briefly about mistrial.

As an initial matter, Your Honor, the state in its response to our pleadings cites Rule 15 as the sort of standard by which remedies should be judged. And that's just incorrect as a matter of law. Brady is a due-process violation. Failure to disclose Brady information is, by its own terms, a constitutional violation.

It is not a mere violation of discovery rules for which limited remedies should be or can be crafted. When you violate Brady, you have violated one of basic principles of our

Constitution.

So the Court -- or the government citing Rule 15 as the fount for where remedies can be found is completely -- is just wrong.

I think in terms of how to look at this violation, we have to start with the supreme court's precedent and we have to start with the state's conduct and what the supreme court thinks about this kind of conduct.

And the state affirmatively, as I said a number of times, represented that no report had been prepared and had not responded to repeated requests from the defense.

Now, what the supreme court warned in Bagley was the prosecutor's failure, quote, to respond fully to a Brady request may impair the adversarial process. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume the nondisclosure of the evidence does not exist. To assume that the nondisclosure of that particular item that's been requested suggests that it doesn't exist. And to make pretrial and trial decisions based on this assumption.

So that's exactly what the defense suffered because of what the state did. The state had this information and made representations to the Court and to the defense, did not respond to repeated requests.

And we made pretrial decisions about what motions to file, how to position this case, what experts to retain. It would be relevant to a medical expert to know that perhaps air wasn't circulating in a particular region thereby perhaps increasing the toxicity of whatever toxin might have been there -- the CO2, the organophosphates, rat poison, whatever it might have been.

That would have been relevant for an expert to look at. It also would have been relevant for us to do further examination into this exact issue. Is it true that having an off-center fire pit creates a radiant-heat barrier? 11 months we would have had to look at that particular issue. We could have conducted our own investigation into it. We could have drafted different motions relating to this exact issue.

Your Honor, my opening statement would have been different. I would have referenced this report. The cross-examinations of every single

witness that had testified would have been different. Because, as the Court has seen, in every witness we have attempted to touch on the causation issue, touch on the knowledge issue.

And with all of the experts and state's witnesses, we've also attempted to touch on the investigation issue, whether or not this investigation was sound. And this is particularly true for the medical witnesses that Ms. Do cross-examined. This type of information would have been critical for that cross-examination.

But more importantly, Your Honor, this failure to disclose this particular fact has systematically impacted this trial. The state has advanced to this court and Mr. Ray that Mr. Ray's guilty of manslaughter because of the way he conducted his ceremony.

And a result of that representation and theory, the state has been permitted to introduce evidence about Mr. Ray's philosophy and teachings, about a comparisons to other sweat lodges, and about comparisons to prior sweat lodges conducted by JRI.

And I don't know how this court would have ruled had a full-blown investigation into

Mr. Haddow's conclusions -- I don't know. None of us know. We can't turn the clock back and look at each of the judgment calls with a different lens.

Because, as the Court has said repeatedly and appropriately, that -- you know -- the Court just calls the issue that's before it. And there are 403 analyses that may have been different had different pieces of information been placed before the Court. There are rulings that may have changed and that may have altered substantial portions of this trial had this information been placed before the Court.

But the Court and this jury have been deprived of all of the that, of evidence suggesting that whatever Mr. Ray did, thought, said, believed, may not have had anything to do with this hidden design defect that might have caused all these deaths.

There is no way to evaluate how this Court's rulings might have been different. And there is no way to turn back the clock. And none of this, Your Honor, would have happened had the state done what it was supposed to do and disclosed the Brady material on April 29, 2010, when they got it; or had they been more candid with us in our

interview of Detective Diskin on June 16, 2010; or if they had been more candid in their 15th disclosure in which they state that there was no expert -- no report prepared; or if they had responded to any of the four letters in a timely manner; or if they had responded to the Court's order in a timely manner of -- the Court's order of December 1, 2010. They did none of those. None of those things.

And instead they chose, chose, to not produce that report. They had their reasons. But they chose not to do it. And case after case, Your Honor, that we cite in our brief at the last few pages of our brief -- I'm saying from page 12 through 13. Case after case cited by our papers.

And, frankly, the right thing to do is to grant not only mistrial but a dismissal of the indictment. And this court, with this record before it, should grant our motion and should do the same.

Thank you, Your Honor.

THE COURT: Thank you, Counsel.

Mr. Hughes.

MR. HUGHES: Thank you, Your Honor.

Your Honor, to begin with, I wanted to

correct a statement in the state's motion or the response to the motion. We had indicated that Detective Diskin had a first conversation, first learned about Haddow shortly or sometime after the indictment.

Last night the detective was reviewing the indictment, discovered he actually mentioned to the grand jury that he had spoken to the environmental quality expert. So I did want to set that straight as far as, I believe, that was on page 2 of the state's response.

Your Honor, with respect to the merits of the motion and the merits of whether a mistrial should be granted in this case, I think it's incredibly important to look at the competing authority or the interlocking authority that governs disclosure. First of all, there is Rule 15, and, secondly, there is Brady and the progeny of cases that discuss Brady.

With respect to Brady, the three elements that Mr. Li focused on are, essentially, the important elements. Was there a nondisclosure? Was it exculpatory? Was it material?

And it's the state's contention that with respect to two of the three elements, the defense

has not established or can they establish that a Brady violation occurred.

Specifically, the email itself, which is attached to the state's response, it's very clear it's not exculpatory information. It's inculpatory information. It was not disclosed due to an oversight in this case. The state disclosed over 8,000 pages in this case. And this particular email was believed to have been disclosed but was not.

The state had originally intended to use this expert until we had some questions about maybe the extent of his qualifications. But the state had intended to use him.

The information in that report is inculpatory. Each of the factors discussed in that report are factors that are controlled by Mr. Ray -- the amount of the humidity in there, the number of participants that leads to the carbon dioxide, the amount of heat in there. Those are all factors that Mr. Ray contributed to or caused.

With respect to the impermeable barrier, that's information that the defense already had and that Mr. Ray, going into the structure, would have known about.

The information in that report -- and there is a number of bullet points. Each one points to factors that are contributing but not the cause of Ms. Neuman's death. Mr. Li argued a number of times that that report identifies another possible cause of death. It does not. It talks about contributing factors, meaning the carbon dioxide or the humidity that were within the structure.

In this case there is a number of cases that are very specific on point from the State of Arizona. The cases the state has cited, though, in its response, in particular the Bracy and the Jensen cases, I think, are important.

Bracy indicated that assuming it was undisclosed, exculpatory information, if it's revealed at trial and the defense has an opportunity to present it to the jury, there is no Brady violation.

In this case the defense hasn't even begun it's case. The state is only midway through it's case. We've only heard testimony so far from one witness who has been involved in the construction of sweat lodge. That's Mr. Mercer. Mrs. Mercer is still on the stand so is still

available to be cross-examined. Mr. Mercer can be called back if the defense had questions about the construction.

In addition to that, the defense had an opportunity to inspect the evidence. Mr. Li argued that the structure was destroyed. But what he isn't arguing is that before it was destroyed, YCSO took a number of samples where they cut through the very top, the rubber -- the "big rubber deal," as Mr. Mercer called it, all the way down to the interior bits of blanket. And they did that in a number of locations around the sweat lodge.

Those were made available to the defense for testing. And also the defense was able to actually see those when they went out and reviewed the evidence in this case.

Your Honor, Brady in particular dealt with the situation where information about a witness's bias was not disclosed to the defense, and it should have been in the Bracy case. However, the Court found that it was not material because there was so much other evidence that was already available to the defense to know about that witness's bias.

In this particular case the factors that

are discussed in Mr. Haddow's report is information that has been available to the defense from the beginning up through recently in this particular case. In Detective Diskin's interview, which was characterized as Detective Diskin sort of artfully trying not to talk about carbon dioxide, beginning on page 47 of his interview -- and that's attached or it's marked exhibit in this case -- he talks about carbon dioxide poisoning. Ms. Do follows up with him as to was that a contributing or what are the factors that you know that could have contributed to the death?

And he says, no. Carbon dioxide poisoning and hyperthermia could both have contributed. That was an interview that occurred back in June of 2010.

In this case Dr. Mosley, one of the medical examiners, was interviewed and was asked about a differential diagnosis or what else could have contributed or caused the deaths. Dr. Mosley talked about CO2 and talked about the fact that they had a lack of oxygen because of the conditions they were in.

That is attached to the state's supplement that was filed about a half an hour

after the response itself was filed last night.

Dr. O'Connor, who is a medical expert that was retained by the plaintiff's attorneys in the cases against Mr. Ray, also prepared reports that talked about CO2 poisoning being a contributing factor to the deaths. And those reports were disclosed. I don't know if they were disclosed in the civil case. But they were definitely disclosed by us in our case.

There is an interview that we cite about a fellow named Randall Potter. And he talked about the conditions in the sweat lodge. That's cited in our motion. He talks about by his calculations, the same air inside the sweat lodge was breathed approximately four times.

And he also talks about the fact that there was very little air circulation back in that back corner.

There is Mr. Sundling's report. Mr. Sundling is an expert in sweat lodges. We've cited some of his statements, again, where he talks about the fact that there is, basically, an impermeable coverings in the sweat lodge that wouldn't have allowed air to come in and out except through the door. The air would be stale in the

back where the victims were sitting. He also talks about the offset pit, as did a number of the other participants who are cited in the state's response.

The state disclosed the notes from the meeting with the medical examiners. And those notes are also attached to the state's supplement to the response where carbon dioxide is discussed.

Your Honor, throughout the case the defense has been aware that carbon dioxide was a contributing factor, at least according to Dr. O'Connor, to possibly Dr. Mosley. Although he ruled that out as a differential diagnosis.

According to the expert, Mr. Sundling, Mr. Li makes a point, and I think there is some validity. But there is a difference between a lay person's testimony and an expert's testimony. In this case they've heard and had reason to know from early on in this case from Dr. O'Connor's reports. He's a medical expert. From Dr. Mosley. He's the medical examiner. Both talking about CO2. And from Mr. Sundling, who talked about the conditions in the sweat lodge -- who is an expert on sweat lodge conditions and construction.

Quite simply, that information that is in Mr. Haddow's report is cumulative to or in addition

to the information that was already available in a very similar way that the Bracy case talked about the information that was not disclosed regarding a witness's bias. In that case it's determined -- in that case it's determined it should have been disclosed. It was exculpatory, but yet there was no violation because it was not material due to the fact it was cumulative or in addition to other information that was available.

With respect to the defendant's request for a mistrial in the case, it's not an appropriate remedy in this case. Again, Brady violation does not occur according to the Bracy case and the Jensen case if the information is disclosed mid trial, which is what occurred in this particular case.

So we're left with a 15.1 analysis and Rule 15 in general analysis. Dismissal is the ultimate sanction. If the defense wants to call Mr. Haddow as an expert, they certainly can do that. If they want to do an interview and gather more information, they can do that as well. It will be several weeks at least before the defense begins their case. If they want to go try and find an additional expert on their own if they're

unhappy with Mr. Haddow's qualifications, they have time.

It's the state's position they have had quite a bit of time and have known about the CO2 issue and the off-set fire pit issue and the membrane structure of the sweat lodge. They've know about that for quite a period of time.

The defense took the position in their opening argument that Mr. Ray did not have anything to do with the sweat lodge construction. They've tried to make that clear through the questioning of witnesses in this case.

Within a couple months of the deaths in this case, the state received what the defense is now calling a "white paper," a very long letter from the defense that sets forth quite a few reasons, in the defense's opinion, why the crime wasn't committed. And they emphasized in that document that Mr. Ray did not build the sweat lodge and wasn't responsible for how the sweat lodge was constructed.

Your Honor, all that information taken together shows that the defense has taken a single nondisclosed email, which the state admits, in good practice at least, should have been disclosed and

was not, out of some 8,000 pages that the state has disclosed and is asking for the ultimate sanction of a mistrial.

That overlooks the rights of the victims in this particular case. It overlooks the fact that the defense has an opportunity still to call Mr. Haddow if they want. It overlooks the fact that the defense has been aware of the CO2 issue since early or mid last year and that the defense has had the opportunity to follow up and ask the medical examiner and also has had the reports from Dr. O'Connor about the CO2 issue.

It overlooks all that and skips right to the conclusion that, A, this is an exculpatory email, which is it's not. The email point by point talks about factors that Mr. Ray controlled. Again, the amount of the carbon dioxide, the amount of the humidity, the amount the heat that was in there, and the length of time that people were exposed to those conditions.

Given all that, Your Honor, the state would ask the motion for mistrial be denied.

THE COURT: Thank you, Counsel.

We're going to take about a 10-minute recess. Thank you.

(Recess.)
THE COURT: The record will show the presence of the defendant, Mr. Ray, and the attorneys.
Mr. Li.
MR. LI: Your Honor, I just have very brief response to the state's argument. The first just basic response is that the cases cited by the state, Jensen, and Bracy, have been, essentially, overruled by Bagley, by United States Supreme Court precedent, and that these cases cited by the state are no longer valid for the proposition that they're citing for.
In State v. Jensen, which was a 1981 case, it was decided before the materiality standard for Brady violations were explained by Bagley and Kyles. And in, Jensen, for instance, the Arizona court explicitly relies on an obsolete materiality standard. The Court quotes prior supreme court case law relating to the standard of materiality, which then the supreme court explicitly replaced in Bagley and Kyles. And that was in Agurs, an earlier case, the supreme court had stated that the materiality standard was whether the undisclosed material would have created a reasonable doubt.

Subsequent to that case and subsequent to the Jensen case, and, frankly, Your Honor, the Bracy case, that standard was replaced by Bagley and Kyles, in which -- replaced with a lower standard, which is -- and this is United States Supreme Court precedent -- whether there is a reasonable probability that the evidence would have affected the outcome in some way with no requirement that he would have been found innocent had the evidence been timely disclosed.
So the various cases that the state cites for the proposition that mid trial disclosure of information is not a Brady violation has been overruled by the United States Supreme Court.
I'd also note that the sort of granddaddy case that kind of deals with these types of issues is another federal case. I believe it's United States v. Leka, L-e-k-a. And it's cited in our brief.
But, essentially, it sets forth the various requirements to find a Brady violation, and it sets forth what the problem is with making disclosures. And in Leka it was made on the eve of trial as opposed to when trial was underway.
It says, essentially, the opportunity to

use the information when disclosed on the eve of trial or when trial is underway is impaired. The Court acknowledges how difficult it can be to assimilate new information, however favorable, when a trial is already prepared on the basis of the best opportunities and choices then available. And this is true for a number of reasons. The defense may be unable to divert resources from other initiatives or obligations that are -- or may seem more pressing. The defense may be unable to assimilate the information into its case. And new witnesses or developments tend to throw existing strategies and preparations into disarray.
And we're not saying that every single mid trial disclosure violates due process. But when it's as fundamental as this where it deals with all three issues -- causation, the quality of the investigation, the state of Mr. Ray's knowledge -- and all of the work that we've done in preparing for this case -- you know, I think the Court has seen, we heard a lead about organophosphates, so we followed. We heard a lead about rat poison. We followed it. We heard a lead about wood. We followed. So we followed every lead that has been shown to us by the state's

evidence.
And had we been shown this particular evidence about the environmental conditions, we would have followed that too.
But the point is, that when you disclose it in the middle of trial, it is not, as the Court has said, the time for further investigation. This is trial. And we are here -- I'm, basically, living here working on nothing but this case. And this is all our team is doing is working on this case.
And we're not investigating things, unless they pop up. But what we're concentrating on is every day in court. And the idea that, oh, well, now we can just sort of do some more investigation and -- you know -- no harm, no foul, and the idea that the state would cite to the Court case law that is overruled, essentially, for this proposition is very problematic.
I'd also make just a few minor points then, I'll sit down. With respect to the cumulative issue, again, the state never addressed the idea of the quality of the investigation issue. The state doesn't address that. The fact that they've had this in their files and they've never

pursued it. They just don't address that.

More importantly, in terms of the logical gaps in the state's argument, the state says that we were on notice because Dr. Mosley considered carbon dioxide as a potential cause of death and, therefore, there is no harm because we already knew. But then the state in the same breath says, and then Dr. Mosley ruled it out.

Well, now you have exactly the situation in those two cases that I cited to the Court -- the New York case and the federal case -- in which one expert says one thing or there is an opinion that says one thing, in this case, carbon dioxide; and then there is another opinion that says something else, in Dr. Mosley's case.

So this is exactly the situation where the evidence is actually unique and disinterested, exactly as the case law provides.

The final thing is, and with all due respect to the victims' bill of rights -- I think I've been hopefully respectful to the tragedy that has been suffered by the families. The law is that the constitutional rights of a defendant take precedent when they've been violated. They take precedent over any other rights, including whatever

the state thinks it's rights to a fair trial are and whatever victims' rights bills there are in the state of Arizona. This is the United States Constitution. It takes precedence.

And I would submit, Your Honor, that to the extent that the victims have been prejudiced by this situation that we're currently in, it is not because of the defense. The prejudice to the victims has been created by the state's failure to disclose what it was required to disclose repeatedly and its conscious decisions not to disclose it and to not be candid when we literally were talking about carbon dioxide with Detective Diskin -- and I don't want to accuse Bill of anything. I just don't remember if it was him or if it was somebody else.

But when the office of the county attorney, that a prosecutor was sitting there next to Detective Diskin and we were asking questions -- and it was obvious. We didn't understand what they were talking about with carbon dioxide. You know. That they did not say, hey, you know what. A month and a half ago I talked to this guy, Richard Haddow. And he opined that it might have been carbon dioxide, and that's what I base my opinion

on.

And the last thing I'd say with respect to that is this idea -- I think Mr. Hughes said that Detective Diskin mentioned in the grand jury something about Mr. Haddow. Well, recall, Your Honor, that Mr. Haddow's report comes out in April 29, 2010. The Grand Jury indicted Mr. Ray about two and a half months, three months, before.

So if they had -- if the detective had discussed carbon dioxide in the grand jury based on discussions with Mr. Haddow, then the state's representation in its papers that there have only been two contacts with Mr. Haddow, one on the 29th in April and one subsequent in which they had a short interview, that would be incorrect. Then there would be some third or fourth or fifth contact with Mr. Haddow about the environmental conditions before the grand jury met.

So I don't know what to do with all of that, Your Honor. And the reason why mistrial is the only possible outcome is because of this continual lack of candor about who knew what when and what they were doing there and what information do they have. And it shouldn't have to be that Ms. Do has to write four letters requesting or that

we have to come to the Court and -- you know -- file discovery motions and ask for sanctions. It just shouldn't be like that.

Prosecutors have a higher duty than that. This whole process has been infected by this continual lack of candor, Your Honor.

MR. HUGHES: Your Honor, if I can address just the issue of Bracy and Bagley.

THE COURT: Okay.

MR. HUGHES: Bagley did not overrule Bracy. Bracy did come out a month or two before Bagley, and both cases, Bracy and Bagley, discuss a prior supreme court case Agurs, which discussed the materiality standard.

The Bagley case -- and specifically I call the Court's attention to page 681. And following from there discusses a situation that gave rise in the Strickland case, which was a completed case where evidence didn't come out at trial at all. That's a different situation than what Bracy was discussing, which is a situation where the evidence comes out mid trial when the defense -- particularly in this case where the defense hasn't even begun their case and it's several weeks away.

So Bagley did not overrule the Bracy case. To the extent that Bagley was talking about the Strickland and how Strickland applied the Augers case, that was specifically dealing with the situation in Strickland where evidence was not presented at all during trial. It was a completely different kettle of fish than what we have here.

THE COURT: Ms. Polk, Mr. Hughes, I had indicated I would consider some other legal matters conditionally, and that's just not practical in this circumstance. This issue predominates obviously.

I'll note right now that I do find there was a Brady violation. And the question is the appropriate remedy. So technically the matter is under advisement at this time. I have a lot of cases to look at. I'll rule as soon as I can.

We're in recess.

(The proceedings concluded.)

STATE OF ARIZONA)
) ss: REPORTER'S CERTIFICATE
COUNTY OF YAVAPAI)

I, Mina G. Hunt, do hereby certify that I am a Certified Reporter within the State of Arizona and Certified Shorthand Reporter in California

I further certify that these proceedings were taken in shorthand by me at the time and place herein set forth, and were thereafter reduced to typewritten form, and that the foregoing constitutes a true and correct transcript.

I further certify that I am not related to, employed by, nor of counsel for any of the parties or attorneys herein, nor otherwise interested in the result of the within action

In witness whereof, I have affixed my signature this 19th day of April, 2011.

MINA G. HUNT, AZ CR No. 50619
CA CSR No. 8335

STATE OF ARIZONA)
) ss: REPORTER'S CERTIFICATE
COUNTY OF YAVAPAI)

I, Mina G. Hunt, do hereby certify that I am a Certified Reporter within the State of Arizona and Certified Shorthand Reporter in California.

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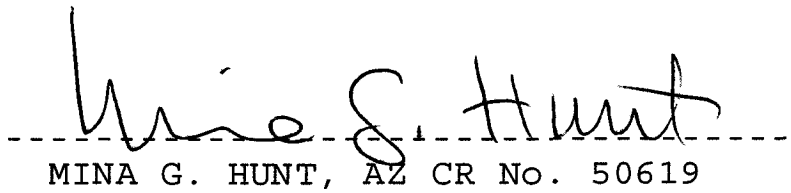

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